

NTSB Order No. EA-3972

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 20th day of August, 1993

Respondent .

Docket SE-13187

The respondent, pro se, has appealed from the oral initial decision Administrative Law Judge William R. Mullins rendered in this proceeding on July 26, 1993, following an evidentiary hearing. By that decision, the law judge affirmed as issued an order of the Administrator revoking, on an immediately effective basis, any airman certificate held by respondent, including Airman Certificate No. 354422420, with private pilot privileges, pursuant to Section 609(c)(3) of the Federal Aviation Act of

1958, as amended, 49 U.S.C. App. 1429(c)(3), (the "Act"),¹ and for his alleged violations of sections 61.15(a), 61.3(a), 61.59(a)(3), 61.19(f), and 91.19(a) of the Federal Aviation Regulations, "FAR," 14 CFR Parts 61 and 91.² For the reasons

¹When the Administrator determines under Section 609(c)(3) "safety in air commerce or air transportation requires the immediate effectiveness of his order," the Board must decide any appeal from the order within 60 days, just as it must do after receiving advice of an emergency order under Section 609(a). We note, in this connection, that when the Administrator filed his order as the complaint in this matter, which, apparently, is the first one the Administrator has labeled "Effective Immediately" since the Act was amended in 1984, the Board was not given the advice concerning an immediacy determination that the statute contemplates and the airman was referred to time limits and procedures applicable to enforcement proceedings that do not require expedited processing. Nevertheless, the actual nature of the order was discovered in time to accord the case accelerated handling under our Rules of Practice, 49 CFR Part 821, Subpart I, "Rules Applicable to Emergency Proceedings."

²Section 609(c)(1) of the Act and FAR sections 61.15(a), 61.3(a), 61.59(a)(3), 61.19(f), and 91.19(a) provide, in relevant part, as follows:

"Sec. 609...Transportation, distribution and other activities relating to controlled substances.

(c)(1) The Administrator shall issue an order revoking the airman certificates of any person upon conviction of such person of a crime punishable by death or imprisonment for a term exceeding one year under a State or Federal law relating to a controlled substance (other than a law relating to simple possession of a controlled substance), if the Administrator determines that (A) an aircraft was used in the commission of the offense or to facilitate the commission of the offense, and (B) such person acted as an airman, or was on board such aircraft, in connection with the commission of the offense or the facilitation of the commission of the offense. The Administrator shall have no authority under this paragraph to review the issue of whether an airman violated a State or Federal law relating to a controlled substance.

"§ 61.15 Offenses involving alcohol or drugs.

(a) A conviction for the violation of any Federal or state statute relating to the growing, processing, manufacture, sale,

that follow, we have determined that the case should be

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disposition, possession, transportation, or importation of narcotic drugs, marihuana, or depressant or stimulant drugs or substances is grounds for-

(1) Denial of an application for any certificate or rating issued under this Part for a period of up to 1 year after the date of final conviction; or

(2) Suspension or revocation of any certificate or rating issued under this part.

(b) The commission of an act prohibited by § 91.11(a) or § 91.12(a) of this chapter is grounds for-

(1) Denial of an application for a certificate or rating issued under this part for a period of up to 1 year after the date of that act; or

(2) Suspension or revocation of any certificate or rating issued under this part.

"§61.3 Requirement for certificates, rating, and authorizations.

(a) Pilot certificate. No person may act as pilot in command or in any other capacity as a required pilot flight crewmember of a civil aircraft of United States registry unless he has in his personal possession a current pilot certificate issued to him under this part....

"§61.59 Falsification, reproduction, or alteration of applications, certificates, logbooks, reports, or records.

(a) No person may make or cause to be made--

* * * * *

(3) Any reproduction, for fraudulent purpose, of any certificate or rating under this part....

"§61.19 Duration of pilot and flight instructor certificates.

* * * * *

(f) Return of certificate. The holder of any certificate issued under this part that is suspended or revoked shall, upon the Administrator's request, return it to the Administrator.

"§91.19 Carriage of narcotic drugs, marihuana, and depressant or stimulant drugs or substances.

(a) Except as provided in paragraph (b) of this section, no person may operate a civil aircraft within the United States with knowledge that narcotic drugs, marihuana, and depressant or stimulant drugs or substances as defined in Federal or State statutes are carried in the aircraft."

remanded.³

The respondent does not on appeal raise any issue concerning the sufficiency of the law judge's findings and conclusions respecting the substance of the charges against him.⁴ He does,

³The Administrator has filed a motion to dismiss the appeal, arguing that the respondent failed to file a notice of appeal by August 2, 1993. However, since the postmark on the envelope containing the notice of appeal received by the Board is August 2, the motion will be denied, as the notice was timely filed.

⁴The charges against the respondent are predicated on the following allegations in the April 15, 1993 Order of Revocation, which served as the complaint in this proceeding:

2. On November 23, 1991, you operated a Cessna Model TU206G airplane, Civil Aircraft N735ZG, the property of another, on a flight in air commerce that landed on a road in Eddy County, New Mexico.

3. After the landing described in paragraph two (2), you were arrested and approximately 785 pounds of marijuana, a schedule I controlled substance, was found on board N735ZG.

4. At the time of your arrest, you were in possession of a false airman certificate.

5. During the flight described in paragraph two (2), you did not have in your personal possession a current pilot certificate issued to Glenn H. Zacher.

6. On or about December 14, 1992, the United States District Court for the District of New Mexico, in the case of United States v. Glenn Zacher, Case No. 91-630JC-02, you were found guilty, and subsequently convicted of conspiracy with intent to distribute more than 100 kilograms of marijuana in violation of 21 U.S.C. 846, and 21 U.S.C. 841(a)(1) and (b)(1)(B). You were sentenced to imprisonment for a term of one hundred twenty (120) months.

7. A part of the acts giving rise to the offense described in paragraph six (6), was your operation of N735ZG.

8. By Order of Suspension dated October 19, 1992, you were ordered to surrender your airman certificate for a

however, present several procedural objections. We find merit in one of them.⁵

Respondent faults the law judge for denying him a continuance, requested at the July 26th hearing, so that he could obtain and consult with counsel.⁶ Although the law judge's denial of that request, strictly speaking, cannot be deemed an abuse of discretion, inasmuch as the Board has no authority to extend its statutory deadline for deciding an immediately effective appeal under Section 609(c)(3), we think that the law

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period of 30 days for failure to report an alcohol or drug-related motor vehicle action to the Federal Aviation Administration, said suspension to continue in effect until 30 days subsequent to the actual surrender thereof. To date, you have failed to surrender your airman certificate.

⁵Respondent correctly points out that Section 821.56 of our rules was not followed in this matter because the hearing was held some nineteen days after the date of the notice of hearing he received, instead of within 7 days, as the rule specifies. This failure on the Board's part, however, does not provide a basis for reversing the Administrator's order, as respondent appears to believe, as the expedition that rule is intended to promote exists primarily to enable the Board to meet its 60-day deadline for deciding an appeal in cases of this kind. See Administrator v. Player, 3 NTSB 3498, 3500-3501 (1981).

We have previously recognized, nevertheless, that delay in holding a hearing to which Section 821.56 applies can result in adverse consequences for an airman who succeeds in his challenge to an emergency revocation order, in that the airman may be grounded for more of the 60 days available to review his appeal than might otherwise have been consumed. See Administrator v. Hegner, 5 NTSB 148, 151, n. 15.

⁶Because the respondent, who appears not to have understood that expedited procedures, and a Board decision deadline, were applicable to the appeal he had taken, attended the hearing with the expectation that a continuance could be granted so that he could obtain counsel, he was not prepared at that time to advance any evidence to rebut the Administrator's case.

judge effectively abridged the respondent's ability to defend against the Administrator's charges because he waited until three or four days before the hearing to orally advise the respondent, through a prison official, that counsel could not, and thus would not, be appointed to represent him.⁷ Since the respondent had made the request in his June 30th notice of appeal from the Administrator's order, received by the Board on July 7, we think that at the hearing he should have been given, and had explained to him, the option either of proceeding without benefit of counsel or of relinquishing his right to expedited consideration of his appeal so that the hearing could be continued until such time as respondent could obtain counsel to assist him. In the circumstances of this proceeding we are persuaded that the failure to so advise the respondent dictates the conclusion that he has been denied the right to a fair hearing and that, accordingly, he should be afforded an opportunity to obtain counsel and defend against the Administrator's charges at a new hearing.⁸

⁷The letter the Board routinely sends to airmen acknowledging their appeals from FAA orders contains advice concerning the necessity to obtain an attorney, if one is to be engaged, as soon as possible in the appeal process. Although such a letter was prepared for the respondent, his denial of having received one is consistent with the fact that, as a copy of the letter in the record reveals, it was misaddressed to a Federal Correctional Facility in Bastrop, Texas, rather than to the one at which he resides in Three Rivers, Texas.

⁸We think our law judges should be especially alert to the difficulties inmates may face in prosecuting appeals to the Board from FAA certificate actions, particularly where, as here, the Administrator has chosen to proceed in a manner that drastically shortens the time available for them to respond and mount a

Because a continuance granted at the hearing, as sought by the respondent, would likely have precluded the Board's compliance with the statutory deadline for deciding the appeal, we will treat the request for a continuance as a constructive waiver of expedited consideration. On remand, the law judge should allow respondent a reasonable period of time to secure counsel before rescheduling the matter for hearing.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is granted to the extent it seeks a new hearing;
2. The initial decision of the law judge is vacated; and
3. The case is remanded for further proceedings consistent with this opinion and order.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

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defense. Limited access to relevant information and Board precedent, restrictions on their ability to communicate with the agency on procedural questions, and delay in the movement of mail to and from them are among the hindrances they may encounter in attempting to exercise their right to Board review.